SITI RAHMAH IBRAHIM

v.

MARAPPAN NALLAN KOUNDAR & ANOR.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 25-320-87]
11 JANUARY 1989

TORT: *Damages - Plaintiff in vegetative state paralysed in four limbs - Award for pain and suffering and loss of amenities - RM180,000 based on current trend.*

TORT: *Damages - Between date of accident until discharge from hospital taken care of by hospital authorities - Parents chose to remain in ward to look after plaintiff - Whether parents entitled to claim for cost of care for that period of time - Cost of care after discharge from hospital - Services rendered by parents - Whether compensation can be given in money to parents - Award of RM350 per month in light of inflation.*

TORT: *Earnings - Section 28A(2)(c)(i) Civil Law Act 1956 - Damages for loss of future earnings - Such loss to be proved or admitted that plaintiff was in good health but for the injury and was receiving earnings by his or her own labour or other gainful activity before injury - Whether allowance received by plaintiff as a trainee teacher was earnings by her own labour or other gainful activity.*

TORT: *Post Amendment Civil Law Act 1956 - Whether application of direct multipler or annuity table in working out quantum.*

TORT: *Damages - Of living person - Proof or admission as to actual living expenses of plaintiff - Plaintiff excused from giving evidence in Court as in vegetative state - Whether Court to take judicial notice of living expenses in view of the special circumstances.*

The plaintiff was injured in an accident on 12 October 1986 at about 8.30 pm involving the bicycle ridden by the plaintiff and motor car driven by the 1st defendant as agent/servant of the 2nd defendant. The plaintiff has suffered severe head injuries with contusion of the brain and fracture of right frontal-bone of the skull with complete paralysis in all four limbs. Liability was agreed by the parties at 35% against 1st defendant and 65% against the plaintiff.

The heads of damages were categorised into four items, namely (1) pain and suffering and loss of amenities (2) nursing care past and future (3) loss of earnings, if any, and (4) special damages. As the accident occurred after the amendment to the Civil Law Act 1956, the issue of multiplier and the loss of earnings, if any was based under the Act.

The plaintiff claimed for general damages and special damages, interest and costs:

Particulars of Special Damages

(a) transport charges to Kuala Lumpur General Hospital visits by family on the date of the accident RM50

(b) transport charges to Kuala Lumpur General Hospital visits by family at RM50 per day for 5 days RM250

(c) transport charges to Malacca General Hospital visits by family at RM20 per day for 5 days RM100

(d) transport charges on the day of discharge from the Malacca General Hospital to Batu Pahat District Hospital by ambulance RM0

(e) Transport charges to Batu Pahat District Hospital visits by family at RM10 per day for 60 days RM600

(f) transport charges to Batu Pahat District Hospital for out-patient treatment at RM50

(g) Repairs to bicycle RM

(h) Cost of purchasing 1 wheelchair RM200

(i) Loss of clothing RM50

(j) Extra nourishing food and medical expenses till date of trial RM500

(k) Cost of extra care and nursing estimated at RM700 per month from the date of accident and continuing.

(l) Loss of allowance as a trainee teacher at RM345 per month from 14/11/87 to 31/12/87

(m) Loss of earnings as a trained teacher at RM550 per month from 1 January 1988 and continuing

(n) other expenses

Held:

[1] As the current trend is to make awards in the region of RM180,000 for brain damage and quadriplegia, the Court awarded the sum of RM180,000 for the plaintiff for pain and suffering and loss of amenities.

[2] The plaintiff's parents were not entitled to claim for cost of care for the period between the date of the accident on 12 October 1986 until the plaintiff's discharge from the hospital on 6 October 1987 as the plaintiff was being taken care of by the hospital authorities.

[3] As for the cost of care at home after the plaintiff was discharged from the hospital, the Court awarded a sum of RM350 per month to be fair and adequate and in the light of inflation.

[4] As for the loss of future earnings, the Court considered that the sum of RM345 allowance per month given to the plaintiff at the time of accident was earnings and fell under the purview of s. 28A(2)(c)(i) of the Civil Law Act 1956 as receiving earnings by other gainful activity.

[5] Since the usage of the annuity tables in this country was more a matter of practice than of law and in view of the set multiplier for victims below thirty, the Court was of the opinion that the direct multiplier should apply as contingencies and the lump sum payment had been taken care of by the amendment as to the set multiplier.

[6] The Court did not make any deduction for living expenses under s. 28A(c)(iii) of the Civil Law Act 1956 as there was no proof or admission as to the actual living expenses as required under that paragraph and found no necessity to make any ruling on its constitutionality despite the request made by the plaintiff's Counsel.

Liability:

35% against the 1st defendant 65% on the part of the plaintiff.

Quantum

(Based on 100% liability)

General Damages:

1. Pain and suffering and loss of amenities RM180,000

2. Cost of future care RM67,200

3. Future loss of earnings RM66,240

Special Damages:

Items (a) to (j) agreed	RM1,540
Items (k)	4,900
Item (l)	no award
Item (m)	RM3,795
Item (n)	no award

Interest:

4% per annum on special damages from date of accident 12 October 1986 to date of judgment 1 December 1988.

8% per annum on general damages, except future losses, from date of service of writ on 17 September 1987 to the date of judgment. Costs to be taxed.

Editor's Note: Defendant's appeal to the Supreme Court *vide* Civil Appeal No. 563 of 1988 against certain awards on quantum is pending. The appeal is against the following:

1. the award of loss of earnings based on the allowance of RM345 per month received by the plaintiff;
2. the award of RM350 per month for nursing care;
3. Failure to deduct living expenses of the plaintiff;
4. Failure to apply the annuity table in calculating the award.

Cases referred to:
Abdullah bin Mat Noor v. Husin bin Saat & Anor. [1985] 2 MLJ xxviii
Soh Kheng Seng v. Leong Chee Hoong & Anor. [1980] 2 MLJ xcix
Abdul Rahim bin Ismail v. Tan Tuck Meng & Anor. [1986] 2 MLJ cclviii; [1987] 2 MLJ xix
John s/o Netchumayah v. Marimuthu a/1 Govindan [1985] 2 MLJ cl
Zamri bin Khalid & Anor. v. Johari bin Khalid & Anor. [1984] 2 CLJ (Rep) 262
Taylor v. Bristol Omnibus Co. [1975] 2 All ER 1107

Legislation referred to:
Civil Law Act 1956, ss. 28A(2)(c)(i), (ii), (iii), (d)(i)

For the plaintiff - Toh Chin Chong; M/s. Murphy & Dunbar
For the defendants - V.T. Singam; M/s. Daim & Gamany

JUDGMENT

Abdul Malek Ahmad J:

As a result of the accident on 12 October 1986 at about 8.30 p.m. between the bicycle ridden by the plaintiff and the motorcar driven by the 1st defendant as a servant and agent of the 2nd defendant at Jalan Besar, Tanjong Malim, the plaintiff had suffered severe head injuries with contusion of the brain and fracture of the right front-parietal bone of the skull with complete paralysis in all four limbs.

It is pertinent at this point to reproduce the last paragraph of the medico-legal report ("C") on the plaintiff done by the consultant neurosurgeon dated 9 June 1988 which had been agreed to by both parties:

> In conclusion, this patient appears to have suffered from severe head injuries that left her comatose for a lengthy period. She suffered from the effects of coma and a profound hypoxic state that have left her vegetative. She is now unable to be in contact with her environment. She cannot express herself, or show any kind of appreciation as in eating, feeling, smelling and the like. She is completely vegetative and bedridden and would require full-time adult to attend to her daily needs. She is permanently brain damaged and devastated by this head injury. I do not see any possibility of an improvement in a neurological status in the future as the injury appears to have been central basal ganglial and brain stem. The resultant severe hypoxia appears to have compounded her problem. In view of the past history of seizures, she will continue to require medications for these indefinitely.

Having called five witnesses to testify for the plaintiff, learned Counsel for the plaintiff on the second hearing date informed the Court that he was agreeing to liability but sought some time to consult his client on the matter. Submissions therefore proceeded on the question of quantum and by letter dated 29 October 1988, learned Counsel confirmed that liability had been agreed to by the parties at 35% against the defendants and 65% against the plaintiff.

As categorised by learned Counsel for the defendants, there were four separate heads of damages in issue, namely, for pain and suffering and loss of amenities, nursing care past and future, loss of earnings, if any, and special damages. For pain and suffering and loss of amenities, the defendants do not dispute that the plaintiff is now in a vegetative state paralysed in all four limbs and totally dependent for her personal needs.

In *Abdullah bin Mat Noor v. Husin bin Saat & Anor.* [1985] 2 MLJ xxviii, I had awarded RM112,000 to a student aged 15 at the time of the trial in July 1987 based on 90% liability against the defendants for severe brain damage with paralysis of most of the body muscles, face, trunk and upper and lower limbs. This would be considered low and inadequate if compared to the Singapore case seven years earlier of *Soh Kheng Seng v. Leong Chee Hoong & Anor.* [1980] 2 MLJ xcix, where an award of $110,000 was made for a fracture dislocation of the cervical spine resulting in quadriplegia. Therefore, when I decided on *Abdul Rahim bin Ismail v. Tan Tuck Meng & Anor.* [1986] 2 MLJ xix, for a cerebral concussion and a fractured cervical spine with traumatic quadriplegia, I had made an award of RM180,000 for pain and suffering and loss of amenities in late 1985 following the case of *John s/o Netchumayah v. Marimuthu a/1 Govindan* [1985] 2 MLJ cl, decided in January that year where the same amount was awarded for a spinal injury which left the plaintiff paralysed below the neck. Again, in June that year, RM180,000 had been awarded for quadriplegia in *Mohd Fami Hassan v. Swissco Pte Ltd. & Government of the Republic of Iraqi [Iraqi State Enterprise for Maritime Transport] - Third Party* [1986] 1 MLJ 461.

In the consequence, I am very much aware that damages for quadriplegia and for brain damage either separately or together have not been very consistent in the past but it is hoped that this inconsistency would be reduced or totally eliminated in the future when everything falls into place. I had earlier compared *Abdullah bin Mat Noor's* case [1985] 2 MLJ xxviii, with that of *Soh Kheng Seng's* [1980] 2 MLJ xcix, but as late as July 1988, RM120,000 had been awarded to a 17 year old plaintiff for quadriplegia in *Loh Koon Tuch & Anor. v. Tham Ah Kow @ Tham Kon Sang & Anor.* [Penang High Court Civil Suit 102/84]. At the other end, in *Zamri bin Khalid & Anor. v. Johari bin Khalid & Anor.* [1984] 2 CLJ (Rep) 262, RM200,000 had been awarded for complete paralysis of both lower limbs and the right upper limb but these were agreed general damages. In the circumstances, I would find that the current trend is to make awards in the region of RM180,000 for brain damage and quadriplegia and would accordingly make an award of RM180,000 for the plaintiff in the present case for pain and suffering and loss of amenities.

Next comes the issue of nursing care. It is not actually in dispute that between the date of the accident on 12 October 1986 until the plaintiff's discharge from the hospital on 6 October 1987, the plaintiff was being taken care of by the hospital authorities. The fact that her parents chose to remain in the ward and look after her during that period is not seriously questioned but I was of the opinion that they were not entitled to claim for the cost of the care for that length of time.

As for the cost of care after the said discharge, the plaintiff's mother [PW3] had testified that RM800 was needed to pay for two persons to look after the plaintiff. Since PW3 did not actually engage anyone to look after the plaintiff, her figures were at the most speculative. There was also no necessity to consider the cost for sending the plaintiff to a nursing home as all along she had been looked after by PW3. In *Taylor v. Bristol Omnibus Co.* [1975] All ER 1107 it was held that the item for care and nursing should not be any less if the plaintiff is looked after at home instead of in an institution as it is now settled that compensation can be given in money for service rendered by parents. The local case authorities cited had given awards ranging from RM150 to RM350 per month and in the event and in the light of inflation I would think an award of RM350 per month to be fair and adequate for the cost of caring for the plaintiff at home. Consequently, for the 14-month period from 6 October 1987 to the date of judgment on 1 December 1988, the award would be RM4,900 as regards item [k] of the special damages claimed.

For loss of earnings, under item (1) of special damages, learned Counsel for the defendant made reference to s. 28A(2)(c) (i) of the Civil Law Act 1956 (hereinafter "the Act") which had been included therein to apply to claims after 1 October 1984 where, in particular reference to the awarding of damages for loss of future earnings, it is stated that in cases other than where the plaintiff had attained the age of fifty-five years or above at the time he was injured, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his or her own labour or other gainful activity before the injury.

Learned Counsel for the defendants argued that in the instant case, the plaintiff was receiving RM345 allowance a month for being trained as a teacher as testified by the principal of the Tanjong Malim Teachers' Institute (PW1) and was therefore not receiving earnings by her own labour or other gainful activity. He contended that an allowance was not "earnings" but only incidental thereto and likened it to a waiter getting tips. He gave examples of "gainful activity" as persons being engaged as a musician or karate instructor.

To earn would generally mean to obtain or procure in exchange for labour and an allowance could mean a sum allowed in account, a limited portion or sum or a rebate, reduction or discount. An allowance, therefore, even if argued to be incidental to earnings, to my mind, would be part of it and can be considered such. This particular section widens the scope for the exchange of the money obtained to include for gainful activity, and with respect to learned Counsel for the defendants, I cannot follow why a teacher undergoing training cannot be considered to be engaged in gainful activity if a musician or karate instructor can. The better analogy, as stated by learned Counsel for the plaintiff, would be to compare the plaintiff's position with a law pupil in chambers. I would, therefore, conclude that the RM345 allowance per month being given to the plaintiff at the time of the accident fell under the purview of the section.

There is evidence to show that this amount continued to be paid to the plaintiff even after the accident up to 13 November 1987, as the training ended on 15 November 1987, so there is therefore no loss for that period. Similarly, there is no evidence to suggest that she was due to get this amount from 14 November 1987 up to 31 December 1987 and the Court will not, therefore, make any award under item (1) of special damages.

There is, however, evidence that if the plaintiff was involved in the accident, she would have commenced work as a trained teacher on 1 January 1988 but despite perusing the notes of evidence, the Court has not been able to locate any evidence to state that the plaintiff would be getting RM550 per month as claimed at item (m) of special damages apart from p. 10 of the non-agreed bundle of documents which states that the plaintiff's basic salary would be RM505 per month if she qualified as a trained teacher at the end of her course. However, in view of s. 28A(2)(c)(ii) of the Act, the Court can only take into account the amount the plaintiff was getting at the time of sustaining the injuries which is RM345 per month and disregard any prospect of the earnings being increased at some time in the future. Consequently, for the period running from 1 January 1988 to the date of judgment, the Court would make an award of RM3,795 for item (m) of special damages.

For item (n) of special damages, there will be no award as there has been no evidence to show that other expenses had been incurred.

Next we come to the question of the multiplier. If not for the amendments to the Act in 1984, the multiplier would have been 21 as the plaintiff was 23 at the time of the accident. By virtue of s. 28A(2)(d)(i) of the Act, the multiplier is now 16 and the Court would take this as the multiplier despite the fact that both parties had agreed to 15. Since the amendments to the Act had been modelled on the English Administration of Justice Act 1982 under which the direct multiplier is used and since the usage of the annuity tables in this country is more a matter of practice than of law, in view of the set multiplier for victims below thirty, the Court is of the opinion that the direct multiplier should apply as contingencies and the lump sum payment had been taken care of by the amendment as to the set multiplier.

In the event, the Court would award RM350 x 12 x 16 amounting to RM67,200 for future cost of care including nursing care and RM345 x 12 x 16 totalling RM66,240 for future loss of earnings. As regards the deduction for living expenses under s. 28A(2)(c)(iii) of the Act, the Court will not make any as there has been no proof or admission as to the actual living expenses as required under the paragraph and finds no necessity to make any ruling on its constitutionality despite the request made by Counsel for the plaintiff.

The awards for the plaintiff based on 100% liability would therefore be as follows:

Special Damages

items [a] to [j] [agreed]	RM1,540
item [k]	RM4,900
item [l]	no award
item [m]	RM3,795
item [n]	no award

General Damages:

pain and suffering and loss of amenities	RM180,000
cost of future care	RM67,200
future loss of earnings	RM66,240

Interest will be at 4% per annum on special damages from the date of accident to the date of judgment and 8% per annum on general damages, except future losses, from the date of service of writ to the date of judgment. Costs are to be taxed accordingly.

Also found at [1989] 1 CLJ 252